

DATE: August 17, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03090

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Over 20 years of alcohol consumption, four alcohol-related incidents, a diagnosis of alcohol dependence some seven years ago, and current drinking after completion of an outpatient group rehabilitation program are unmitigated by steps taken to avoid drinking and driving; falsification of an SF-86 less than three years ago by denial of alcohol-related counseling or treatment is also unmitigated. Clearance is denied.

STATEMENT OF THE CASE

On February 16, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated March 9, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on May 21, 2001, and a notice of hearing was issued on June 4, 2001. The undersigned held a hearing on July 11, 2001. The Department Counsel presented 12 exhibits ("exhs"), but no witnesses. The Applicant's case consisted of the presentation of 14 exhibits and only his testimony. The record in this case closed on July 11, 2001. The undersigned Administrative Judge received the transcript ("tr")⁽¹⁾ of the hearing on August 1, 2001.

SOR AMENDMENT

SOR ¶ 2.a was amended at the hearing on the Administrative Judge's motion in accordance with item 17 of the additional procedural guidance of the Directive (encl. 3) by substituting references to SOR ¶¶ 1.d, 1.f, and 1.c for the

references to SOR ¶¶ 1.c, 1.e., and 1.d, respectively. Tr pages 88-90.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following three guidelines: paragraph 1, Guideline G (alcohol consumption); paragraph 2, Guideline E (personal conduct); and paragraph 3, Guideline J (criminal conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 38-year-old engineer/scientist-3 employed by a U.S. Government contractor since February 1997. Exh. 1; tr page 5; tr pages 79-80. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant has never married. In 1986 he was graduated with a bachelor's degree in electrical engineering. He started drinking alcohol when he was about 15 years old, has on occasion been intoxicated, and continues to drink. Tr page 47. He currently estimates that he drinks on average 24-30 beers a week and has done so over the last several years. Tr pages 52-55. The Applicant had alcohol-related incidents in February 1989, December 1991, April 1994, and December 1997. (2) SOR answer. He received court-ordered outpatient group counseling/treatment for diagnosed alcohol dependence in 1994. (3) Exh. 9, page 15. In 1994 he decided he would never drink and drive again. Tr pages 48-49; exh. 8. He did not attend more than one or two Alcoholics Anonymous (AA) meetings after his discharge from outpatient group counseling/treatment to continuing care. Tr pages 73-75; exh. 9, page 40. During an episode in April 2000 he was diagnosed with alcohol-induced psychotic disorder with hallucinations. Exh. 10; exh. 12, page 5.

In November 1999 the Applicant signed a Questionnaire for National Security Positions (SF-86). In response to question #24 asking whether he had ever been charged with or convicted of any alcohol-related offenses, the Applicant answered "yes" and listed his arrests in 1994 and 1998, but did not list his arrests in 1989 and 1991. In response to question #30 asking whether since November 1992 his use of alcoholic beverages resulted in any alcohol-related treatment or counseling, the Applicant answered "no." He was told at the time he completed the SF-86 that the scope of the questionnaire was limited to the last seven years, *i.e.*, since November 1992, and therefore excluded his 1989 and 1991 arrests for alcohol-related offenses. Exh. A; exh. 8; tr pages 36-39. He did not consider his 1994 counseling/treatment to be included in question #30 because it was only provided in a group setting rather than on an individual basis and was court-ordered. SOR answer; tr pages 39-40.

The Applicant is a good performer at work, has been promoted, and has sufficient savings so that he feels he could not be "bought," *e.g.*, be tempted to sell classified information. Tr pages 40-45; exhs. B-M. The Applicant does not consider himself to be an alcoholic--although he admits he does not know what is the definition of an alcoholic--but concedes he is a "problem drinker." Tr pages 51, 62.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE G - ALCOHOL CONSUMPTION

Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

Conditions that could raise a security concern and may be disqualifying include:

[1st] Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;

[4th] Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

[6th] Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

Conditions that could mitigate security concerns include:

[4th] Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with after-care requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

GUIDELINE E - PERSONAL CONDUCT

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying also include:

[2nd] The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

Conditions that could mitigate security concerns include:

[4th] Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;

GUIDELINE J - CRIMINAL CONDUCT

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

[1st] . . . criminal conduct, regardless of whether the person was formally charged;

[2nd] A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

[1st] The criminal behavior was not recent;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.

- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. ⁽⁴⁾

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can

reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. ⁽⁵⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Government established its case with regard to Guideline G.

The Applicant has a lengthy history of alcohol consumption, four alcohol-related incidents away from work in about the last 12 years, a diagnosis of alcohol dependence seven years ago, and is still drinking on average about four beers every day. Tr page 98. This falls within the scope of DC #1, DC #4, and DC #6, which are identified on page 4 *supra*. In mitigation, he has not had a DUI arrest in seven years and has taken steps since to avoid drinking and driving. He has completed outpatient rehabilitation, does not have a favorable prognosis, does not participate frequently in AA meetings or a similar organization, and has not abstained from alcohol for at least 12 months. See MC #4, which is also identified on page 4 *supra*. Therefore, SOR ¶ 1 (alcohol consumption) is concluded unfavorably to the Applicant.

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the witness who testified, the undersigned concludes that the Government established its case with regard to Guidelines E and J.

The Applicant deliberately omitted his 1989 and 1991 DUI arrests and his 1994 alcohol counseling/treatment from his SF-86 in November 1999. This falls within the scope of DC #2 under Guideline E, which is identified on page 5 *supra*. In mitigation, the omission of the earlier arrests was proximately caused by improper or inadequate advice by authorized security personnel at the time the SF-86 was provided to the Applicant for completion and was corrected when interviewed by a Defense Security Service (DSS) agent. This falls within the scope of MC #4 under Guideline E, which is also identified on page 5 *supra*. However, the Applicant's explanation why he did not consider the 1994 alcohol course required by the court to be counseling/treatment is unpersuasive. The SF-86 question itself is not limited to voluntary treatment or voluntary counseling nor is it limited to one-on-one therapies. The Applicant chose to interpret the question on the form restrictively without reasonable justification and thus falsified his response to the SF-86. Therefore, SOR ¶ 2 (personal conduct) is concluded adversely to the Applicant.

With regard to Guideline J, SOR ¶ 3 charges that the Applicant's falsification constitutes criminal conduct (18 U.S.C. §1001). Conduct violative of that Act of Congress is a Federal felony. ⁽⁶⁾

The undersigned concludes that the Applicant did knowingly and willfully falsify, conceal, or cover up his 1994 alcohol counseling/treatment on his SF-86, which falls within the scope of DC #1 and DC #2 under criminal conduct identified on page 5 *supra*. The falsification occurred rather recently: some 2½ years ago. ⁽⁷⁾ Therefore SOR ¶ 3 (criminal conduct) is also concluded unfavorably to the Applicant.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on pages 5-6 *supra*. The nature and extent of the Applicant's alcohol dependence is much more serious than he believes. His age, diagnosis, and the amount of alcohol he consumes currently weigh against him, as does the absence of current rehabilitation. The SF-86 falsification is inexcusable. He sees his 1994 course in punitive rather than therapeutic terms.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

Subparagraph 3.b.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Jerome H. Silber

Administrative Judge

1. The transcript at pages 27 ff. erroneously refers to "JUDGE LESNICK" rather than to the undersigned Administrative Judge.
2. The Applicant pleaded guilty to DUI charges in 1989, 1991, and 1994. He has not been arrested on DUI charges during the last seven years. The Applicant pleaded guilty to a Public Intoxication charge after his arrest in 1997 when he was not driving. He nevertheless contests the grounds for the latter arrest. Tr pages 33-36.
3. The Applicant relapsed once during the six-week course and was required to start the course anew. Exh. 8; exh. 9, page 33; tr page 68-69. He was diagnosed as alcohol dependent, moderate. Tr pages 70-71.
4. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this

review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

5. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

6. *Compare* exh. 8. The cited provision now provides:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than five years, or both.

Such an offense is classified as a Class D felony in accordance with 18 U.S.C. §3559(a); with regard to the maximum fine authorized, *see* 18 U.S.C. §3571.

7. However, SOR ¶ 3.b alleges that the Applicant's alcohol-related incidents that occurred 7-12 years ago also constitutes criminal conduct. This is mitigated by the passage of time. *See* MC #1 under Guideline J, which is identified on page 5 *supra*.